APPENDIX A

BRIEFS BEFORE THE MICHIGAN SUPREME COURT WITH RESPECT TO ACT 201

Brief of Michigan Sugar Company

X.

THE EXISTENCE OF ACT 201, PUBLIC ACTS OF 1953, PAGE 281 (1948 C.L. 300.201; M.S.A. 13.1485) REQUIRES THIS COURT TO REVERSE THE TRIAL COURT WITH OR WITHOUT A NEW TRIAL, EVEN THOUGH IT WAS NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

The statute in question reads as follows:

> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other valuable consideration for the purpose of hunting, fishing or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

Candor compels our admission that this statute escaped the attention of this brief writer until it was noted in the December 8, 1962 publication of the Negligence Law Section Bulletin of the State Bar of Michigan. It is cited nowhere in the Michigan Reports. We think the force of the enactment is to deprive the plaintiff of any cause of action under the proofs in this case. It is not a matter of affirmative defense nor of limitation. Its language is to abolish any such cause of action. It has no limitation. The cause of action no longer exists. It applies to "any person". The Statute in question expresses the public policy of the State. It places the law with reference to trespassing hunters, fishermen and trappers, including minors, where it was prior to the more recent adjudications dealing with tres-

passing children and beginning with *Lyshak* v. *City of Detroit*, 351 Mich. 230.

The first question that presents itself is:

> CAN THE DEFENDANT RAISE THE QUESTION AND CAN THE COURT CONSIDER IT ON APPEAL SINCE COURT AND COUNSEL WERE UNAWARE OF IT AND IT WAS NOT CONSIDERED IN THE TRIAL COURT?

We think it can be. Simple justice directs that it should be.

While the general rule is that "when a cause is brought up for appellate review, a party cannot assume an attitude inconsistent with or different from that taken by him at the trial and is restricted to the theory on which the cause was prosecuted or defended in the Court below." *4 C.J.S.*, (Appeal and Error, Sec. 241), there is an exception to the general rule which is as well recognized as the rule itself which is discussed in *4 C.J.S.* 7451 (Appeal and Error, Sec. 242). It is there said:

> "Certain limitations and exceptions to the general rule that questions not raised below will not be considered on appeal have been recognized by the Courts. Whether an appellate court should review the question raised in it for the first time depends on the facts and circumstances disclosed by the particular record or case. As the rule is for the purpose of orderly administration and the obtainment of justice, whether or not the Court will follow it is ordinarily a question of administration. Where the consideration of a claim sought to be raised for the first time on appeal is necessary to a proper determination of the case, or the record shows that certain facts existed that were necessarily decisive of the action or where the determination of a question would be decisive of the entire

controversy on its merits, such matters may be considered although first raised on appeal.

"The failure to present the Trial Court that of which it is charged with judicial knowledge does not preclude its consideration for the first time on appeal, and a question which affects the right of recovery or right to maintain an action may be raised for the first time on appeal. Even though overlooked in the Trial Court, a pertinent statute or constitutional provision may be considered and legal defenses based on public statutes may be first raised on appeal."

Among the cases cited in support of the exception to the rule is *Morris* v. *Radley,* 306 Mich. 689. A judgment had been entered in the Trial Court against Radley and the Oceana County Road Commission. The plea of governmental immunity had not been interposed in the Trial Court because the defense of governmental immunity was not then available under the judicial decisions of the State of Michigan. Subsequently it was held that a plea of governmental immunity was available. A motion for a new trial had been filed in the court and was denied by the Trial Judge because the case was then pending on appeal. The opinion goes on to say:

"Counsel for defendants now ask this Court to consider the matter and allow the County Road Commission to interpose the defense in order to prevent a miscarriage of justice. We concede this should be allowed. The judgment against the defendant County Road Commission in fairness should be set aside notwithstanding the failure of the defendants to raise the defense at the trial due to the circumstances related. In a recent case, *People* v. *Holmes,* 292 Mich. 212, we said:

'It is axiomatic that an objection not properly and timely presented to the court below will be

ignored on review and, except under unusual circumstances, we have no disposition to relax this rule. Nevertheless, in the exercise of supervisory control over all litigation, appellate courts have long asserted the right to consider manifest and serious errors although objection was not made by the party who appeals. As stated in *Gonzales* v. *Rivera*, 37 N. M. 562, 567 (25 P. (2d) 802):

> ' "Ordinarily, this court is content to examine the points here relied upon for reversal, if properly preserved at the trial, sustaining or overruling them. That is all appellants are entitled to as of right. But that does not limit the inherent power of this court to prevent fundamental injustice." '"

The opinion further goes on to state:

> "This court may exercise any of the powers of amendment of the court below and make any order, or grant such relief, as the case may require. Court Rule No. 72 (1933). We would be remiss in doing justice, were we to allow the judgment against the county road commission to stand, while we have jurisdiction over the case on appeal."

In *State* v. *Pacific Waxed Paper Company*, 157 P. (2d) 707; 22 Wash. (2d) 844; 159 A.L.R. 297, it is said:

> "We have held many times that questions not raised in the court below will not be considered on appeal. We do not wish to depart from that rule, but it has its limitations. If the question is one that upon its answer depends whether the complaint states a cause of action and the complaint cannot be amended, then it may be raised at any time. *Fick* v. *Jones*, 185 Wash. 365; 55 P. (2d) 334."

In *Holzer* v. *Rhodes*, 163 P. (2d) 811; 24 Wash. (2d) 184, it is said (813):

> "Ordinarily we would not consider that type of question at this time because we have considered many times that questions not raised in the court below will not be considered on appeal. This rule does not apply when the question raised affects the right to maintain the action."

In *Adley Express Company* v. *Town and Darien*, 7 A. (2d) 446; 125 Conn. 501, it was said:

> "Ordinarily questions not raised at the trial will not be considered on appeal. An exception is made when a pertinent statute has been overlooked."

In *Bedenbaugh* v. *Adams* (Fla. 1956) 88 So. (2d) 765, the Supreme Court in disposing of the matter similar to the one at bar said:

> "Apparently the parties in the Trial Court and in this Court have overlooked the provision of Section 585.15 and the provision of Section 585.16 F.S.A."

and then went on to say:

> "As stated above and in fairness to the Chancellor, it is apparent that the statutes on which this decision has been determined were evidently not brought to his attention by the parties below. Nonetheless, they are the law of the State and appear to control the matter before us. We have no alternative but to follow them."

In *Yannuzzi* v. *United States Casualty Co.*, 115 A. (2d) 557; 19 N.J. 201, which was a case involving an insurance

policy, the Court had this to say about recognizing a State statute:

> "The legislature expressly provided that every policy should be deemed to include a provision that notice by the assured to any authorized agent of the insurer within this State shall constitute notice to the insurer. We unhesitatingly reject the defendant's contion that this provision, although phrased very comprehensively, is applicable only to cases where the assured has become insolvent or bankrupt; the statute's reference to the continued liability of the insurer, notwithstanding the assured's insolvency or bankruptcy, is an independent one and does not limit the scope of the clear provision relating to notice to the insurer's agent. We likewise reject the defendant's intention that we should not take cognizance of the statute because (though fairly briefed and argued before us) it had not earlier been brought to the attention of the lower courts. The doctrine that courts will ordinarily decline to consider matters not raised below (*Roberts Electric, Inc.* v. *Foundations and Excavations, Inc.*, 5 N.J. 426, 429; 75 A. (2d) 858 (1950)) has little application where, as here, we are confronted with a legislative enactment which embodies a public policy of our state which this Court may justly enforce between the parties."

See *Mitchell* v. *Allison*, 213 P. (2d) 231, in which the Supreme Court of New Mexico (1949) said:

> "Notwithstanding Rule 20, the Supreme Court, in the interest of justice, has not limited to jurisdictional questions those that can be first ruled on in the Supreme Court. In *Candelaria* v. *Gutieriez*, 30 N.M. 195, 230 P. 436, it was said there were three exceptions to the general rule, to-wit: (1) Jurisdictional questions; (2) Questions of a general public nature affecting the

State at large; and (3) Questions affecting the fundamental rights of the parties."

Megarry Bros. v. *City of St. Thomas,* 66 N.W. (2d) 704, (N.D. 1954) where it is stated:

"Ordinarily, questions not raised at the time of trial will not be considered on appeal but to that rule there are certain exceptions. Where a pertinent statute has been overlooked resulting in claimed error that is of public concern, this Court will consider the error, though it be not brought to our attention by either of the parties."

In *Rubens* v. *Costello,* 251 P. (2d) 306; 75 Ariz. 5, it was said:

"The record in this case shows certain facts to exist that are necessarily decisive of the action which do not fall within the assignments of error, nor the theories upon which the case was tried below. The briefs on appeal follow the theory on trial. As we held in *Munger* v. *Boardman,* 53 Ariz. 271; 88 P. (2d) 536, and *International Life Insurance Co.* v. *Sorteberg,* 70 Ariz. 92; 216 P. (2d) 702, 706; when the record in a case on appeal shows affirmatively that cetrain facts exist sufficient to determine an issue, which though not specifically presented and tried out in the lower Court is necessarily decisive of the action, we will consider and determine the appeal upon that issue notwithstanding it was never formally raised or litigated in the lower Court. *International Life Insurance Co.* v. *Sorteberg, supra.*

"It is the general rule that an appellate court will not consider the question not first raised in the lower court but this court said in the case of *Town of South Tucson* v. *Board of Supervisors,* 52 Ariz. 575; 84 P. (2d) 581, 584, this is merely a rule of procedure and not a matter of jurisdiction. * * * One of the exceptions to the rule is questions of a general public nature

affecting the interests of the state at large and this is particularly true when the question raised for the first time is one of substantive law which is not affected by any dispute as to the facts of the case, for under such circumstances the parties may present the issue as thoroughly in the appellate court as it could have been presented below, without injury to either one. *Town of South Tucson* v. *Board of Supervisors, supra.*"

The Court further went on to say:

"Another exception to the rule is that: * * * a legal principle, although not suggested by either party at the trial (and we include on appeal) should be adopted in order to finally dispose of a cause on appeal if this impels the speedy enforcement of a right, or redress of a wrong, and, as a correct exposition of the law, is appropriate to the facts involved."

See *LePire* v. *Workmen's Compensation Bureau,* 111 N.W. (2d) 355 (S. Ct. N.D. 1961). It was there held that where a pertinent statute had been overlooked by both counsel and the court resulting in claimed error in a matter that was of public concern, the Court would consider the error even though it was not brought to the attention of the Court by either of the parties. Citing *Megarry Bros.* v. *City of Saint Thomas,* (N.D. 1954) 66 N.W. (2d) 704.

It is said in *5 Amer. Jur.* (2d) 33 (Appeal and Error, Sec. 548):

"The general rule has also been denied application where the question raised first on appeal relates to the foundation of the rights of the parties, as where the effect of the application of the rule would be to make the rights of the parties depend upon a statute which the court is judicially bound to know does not govern the case."

Citing *Huntress* v. *Huntress' Estate,* (CA 7 Ill.) 235 F. (2d) 205, 61 ALR (2d) 682. In that case it was said:

> "It has been suggested that since the point was not raised in the Trial Court that a remedy exists under Rule 18(b) and Section 1655 and neither the rule nor the statute were called to the attention of the District Court, this Court should not invoke them. However, we are of the opinion that that fact does not prevent us from noticing and applying the pertinent rule and statute. Thus, the Supreme Court has said that an appellate Court reviews judgments, not statements in opinions. *Black* v. *Cutter Laboratories,* 76 S. Ct. 824. The party's failure to call the Trial Court's attention to a relevant statute does not preclude the appellate Court from considering it. *Federal Deposit Insurance Corporation* v. *Vest,* (6th Cir.), 122 F(2d) 765, certiorari denied 314 U.S. 696; 62 S. Ct. 414; 86 L. Ed. 557. A Court of review may consider and construe a statute determinative of the case which was not specifically called to the attention of the Trial Court." (Citing cases.)

See *Smith* v. *Pasqualetto,* 246 F. (2d) 765 (U.S.C.A. 1st Cir. Mass.), where the Court said:

> "Certainly, a Federal Court may on its own initiative take notice of relevant rules of state law."

Although no mention of this is made in the pleadings, their comment in the case (767) is particularly comforting to this brief writer. It is there said:

> "However, occasionally, as here, an applicable rule of law eludes not only counsel, but also since omniscience can hardly be expected, of the trial judge."

Palo Blanco Fruit Co. v. *Palo Alto Orchards Co.,* 195 F. (2d) 90 (U.S.C.A. 1st Cir. Mass.).

A case which we consider persuasive in support of our position is that of *Leary* v. *Citizens and Manufacturers National Bank*, 23 A. (2d) 863 (Conn. 1942). This is a case in which the appellate Court reviewed the decision of the trial Court granting judgment on a promissory note. In that case a statute was not pleaded nor considered by the Court below. The Court cites a provision of the Connecticut practice providing:

> "Errors considered—This Court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the Court adversely to the appellant's claim or that it arose subsequent to the trial."

The Court stated, however, that:

> "T. se do not, however, preclude this Court from considering questions of law which were not raised before the Trial Court. While we are not 'bound to consider' such claims of error and do not ordinarily do so, we have upon occasion considered a question which was not so raised not by reason of the appellant's right to have it determined but because, in our opinion, in the interest of public welfare or of justice between individuals it ought to be done. * * * Accordingly, we have followed this course where the error was manifest. (*Riggs* v. *Zaleski*, 44 Conn. 120); where an applicable statute was overlooked (*Cunningham* v. *Cunningham*, 72 Conn. 157, 160; 44 Atl. 41; *Schmidt* v. *Manchester*, 92 Conn. 551, 555; 103 Atl. 654; *Stevens* v. *Nelagon*, 116 Conn. 307, 311; 164 Atl. 661; *Adley Express Co., Inc.* v. *Darien*, 125 Conn. 501, 504; 7 A. (2d) 446) and where the error went to a vital issue in the case. *Fairfield* v. *Newtowns*, 75 Conn. 515, 518; 54 Atl. 301; *Wickes* v. *Knorr*, 113 Conn. 449, 456; 155 Atl. 816;

G. & H. Investment Co. v. *Raymond,* 113 Conn. 778, 779; 155 Atl. 497."

Our Michigan Supreme Court on other occasions has spoken of its inherent powers and of its rights under Michigan Court Rule No. 72 to:

> (g) "Give any judgment and make any order which ought to have been given or made and to make such other and further orders and grant such relief whether mentioned in the notice of appeal or not as the case may require."

It has announced its "exclusive powers" as being outside the legislative province. *St. John* v. *Nichols,* 331 Mich. 148, 158 where it was announced that "this Court possesses inherent power however to order a new trial whenever it deems that the end of justice so requires." It said the same thing in *Weller* v. *Mancha,* 353 Mich. 189, 195. It granted a new trial unasked for in *Bahr* v. *Miller Bros. Creamery,* 365 Mich. 416, 428. It is interesting to note that in that case also a $40,000 verdict was rendered and it was argued that a remittitur down to the figure of $30,290 should be directed; that the Court found the figure "so excessive when compared to the proof of actual damage in the appellant's record as to suggest that some obvious element of mistake or prejudice into the jury's calculations." We cannot forbear a quotation from a member of this Court in *Montgomery* v. *Stephan,* 359 Mich. 33, 38, which said:

> "Our oath is to do justice, not to perpetuate error."

We respectfully urge therefore, in view of the foregoing authorities, that this Court has power to do so and that justice requires that the verdict and judgment be reversed with or without a new trial even though the statute was not considered in the Court below.

Brief of Heider

X.

THE EXISTENCE OF ACT 201, PUBLIC ACTS OF 1953, PAGE 281 (1948) C.L. 300.201; M.S.A. 13.1485) DOES NOT REQUIRE THIS COURT TO REVERSE THE TRIAL COURT WITH OR WITHOUT A NEW TRIAL, EVEN THOUGH IT WAS NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

The defendant appellant very candidly admits never having raised this defense in his pleadings, at trial, his motion for new trial or his reasons and grounds for appeal; it is only in his brief on appeal that he asks this Court for aid and assistance. Therein he cites the rule rightfully that not having raised the question of the Statute previously, he is precluded from raising it now. *Wardle* v. *Cummings,* 86 M 395; *Ketchell* v. *Keene,* 171 M 108; *Willok* v. *Townsend,* 245 M 632; *Rodal* v. *Crawford,* 272 M 99; *Kellom* v. *City of Ecorse,* 329 M 303.

But, says the defendant, the statute is a complete bar to plaintiff's lawsuit without reference to the defense being raised. The theory of the defendant is that the Statute is not a matter of affirmative defense. If it is not an affirmative defense, what kind is it? Can it be raised as part of the general issues? Can it arise by itself without notice to anyone — the plaintiff, the defendant or the trial court? Your plaintiff contends that this defense comes under Court Rule 23 Section 3, wherein affirmative matters seeking to defeat the cause of action set forth in the declaration take the opposite party by surprise must be plainly set forth in the answer.

But the defendant also claims that not having brought forth his defense, the Supreme Court can and should on its own volition use the defense of the Statute in question. As authority for his position he cites *Morris* v. *Radley,* 306 Mich. 689. In this case the Supreme Court did allow the insertion of a new defense of government immunity.

This was brought about by a new decision allowing this defense after the above cited case had been tried and an appeal taken. When the new decision appeared, the defendant moved for a new trial which had to be denied because the trial court had lost jurisdiction due to the appeal. The Supreme Court, therefore, said that since they had changed the law, the Defendant had the right to introduce the new issue of governmental immunity on appeal.

Defendant claims that since his defense is based on a statute that the trial court and the Supreme Court should take judicial notice of the statute. This position has been presented on other occasions to this Honorable Court and decided against the appellant. In *Shaver* v. *Associated Truck Lines,* 322 Mich. 323, the defendant tried to urge that plaintiff had violated a section of the motor vehicle law by carrying a passenger on his bike and that this was a contributing factor in his negligence. The Court said: "this claim was not raised in the pleadings, is not mentioned in the record and first appears in defendant's brief. It is now too late to inject this issue in the case." Other cases covering statutes are: *Hollister* v. *Kinyon's Estate,* 195 Mich. 261; *Selznick Enterprises* v. *Garson Productions,* 202 Mich. 106; *D & W Rottschafer Real Estate* v. *Morris,* 245 Mich. 192.

Forgetting the technical defects of defendant's position, let us examine the statute in regard to the rights of the minors. The defendant seemingly would accept liability had the minors entered into a voidable contract with the defendant by paying. Think of it, a 12 and an 8 year old entering into a contract so their estates could recover for their deaths. But going further, the statute cited is not the only one penalizing trespassers. Regardless of the statutes, Michigan has joined approximately forty other states in liberalizing recovery for trespassers, especially in the case of children.

Furthermore, plaintiff's declaration cited statutes wherein the defendant in their function as land owners and operators were negligent towards public safety.

In final analysis, the courts have come to the conclusion that the duty of care stands higher than the sanctity of land ownership. In the question based now before this Honorable Court, the matter of a few pieces of silver should not override the duties owed to the youngsters involved.

Heider Brief, Supplement to Argument No. 10

Here, the Defendant has attempted to claim that this statute applies to minors, and asks that instead of looking at the status symbol of trespassers, licensees and invitees, we look at the functional symbol of fishing, trapping or just plain trespassing. In *Lyshak* v. *City of Detroit,* 351 Mich. 230, this Court affirmed a $50,000.00 award for a loss of an eye for a child struck by a golf ball. If Lyshak had two friends with him, one with a fishing pole, one with a trap and all three trespassed on the city's golf course property, Lyshak to play in the water, his one friend to fish and the other one to trap, the Defendant claims there would be a different rule of liability for injuries or death of Lyshak and his two friends. This statute clearly does not apply. Moreover, if the Defendant instead of letting its fences decay, had properly maintained them, Lyshak would not have been on a golf course and the Heider children would not have been in the pond.

APPENDIX B

Ala. Code Ann., tit. 47, §§ 281 to 285 (Supp. 1965) (broad category of recreational users)

Cal. Civil Code § 846 (Supp. 1965) (broad category of recreational users)

Conn. Genl. Stats. § 26-16 (1958) (hunting, fishing and trapping)

Fla. Stats. Ann. § 375.251 (Supp. 1965) (broad category of recreational users)

Smith-Hurd Ill. Stats. Ann., ch. 70, §§ 31 to 37 (Supp. 1965) (broad category of recreational users)

Burns' Ind. Stats. Ann. §§ 11-1815 to 1817 (Supp. 1965) (broad category of recreational users)

Kan. Stats. Ann. §§ 58-3201 to 3207 (Supp. 1965) (broad category of recreational users)

Baldwin's Ky. Rev. Stats. Ann., pt. 2, S.B. 311 (Supp. 1966) (broadcategory of recreational users)

Me. Rev. Stats. Ann., tit. 12, §§ 3001 to 3005 (1964) (hunting, fishing, trapping, camping, hiking and sightseeing)

Md. Code Ann., art. 27, § 578 (1957) (Supp. 1965) (hunting)

Minn. Stats. Ann. §§ 87.01 to .05 (1964) (broad category of recreational users)

Mont. Rev. Codes Ann. §§ 67.808 to 809 (Supp. 1965) (broad category of recreational users)

Neb. Rev. Stats. §§ 37-1001 to 1008 (Supp. 1965) (broad category of recreational users)

Nev. Rev. Stats. § 41.510 (1965) (hunting, fishing, trapping, camping, hiking, and sightseeing)

N.H. Rev. Stats. Ann. § 212:34 (1964) (hunting, fishing, trapping, camping, hiking, and sightseeing)

N.J. Stats. Ann. § 2A:42A-1 (Supp. 1966) (hunting and fishing)

N.Y. Genl. Oblig. Law § 9-103 (Supp. 1965) (hunting, fishing, trapping, hiking, and dog training)

N.C. Genl. Stats. §§ 113-120.5 to .7 (Supp. 1965) (broad category of recreational users)

N.D. Century Code §§ 53-08-01 to -06 (Supp. 1965) (broad category of recreational users)

Page's Ohio Rev. Code Ann. §§ 1533.18 to .181 (1964), as amended, § 1533.181 (Supp. 1965) (broad category of recreational users)

Okla. Stats. Ann., tit. 76, §§ 10 to 15 (Supp. 1965) (broad category of recreational users)

Or. Rev. Stats. § 30.790 (1965) (broad category of recreational users)

Purdon's Pa. Stats. Ann., tit. 12, § 1629 (Supp. 1965) (hunting and fishing)

Tenn. Code Ann. §§ 51-801 to 805 (1966) (broad category of recreational users)

Vernon's Tex. Stats. Ann., tit. 1, art. 1b (Supp. 1965) (hunting, fishing, and camping)

Va. Code Ann. § 8-654.2 (Supp. 1966) (broad category of recreational users)

W. Va. Code Ann. §§ 2200(31) to (36) (Supp. 1965) (broad category of recreational users)

West's Wis. Stats. Ann. § 29.68 (1964), as amended, § 29.68(3) (Supp. 1966) (broad category of recreational users)

Wyo. Stats. Ann. §§ 34-389.1 to .6 (Supp. 1965) (broad category of recreational users)